No. 77-1240

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADIBA MAHROOM, PETITIONER

v.

COLONEL JOHN HOOK, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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1. In 1971, petitioner filed an administrative complaint charging the Department of the Army with employment discrimination. She alleged that she had been denied a teaching position at the Defense Language Institute because of her sex and her national origin. The Army's Civilian Appellate Review Office and the Civil Service Commission's Board of Appeals and Review both ruled that the allegations of discrimination were unfounded (Pet. App. 18-20). Petitioner was notified of the adverse decision. She was not told that she had a right to sue in district court on the claim, however, because it was the position of the Civil Service Commission that allegations of discrimination by the federal government occurring

prior to March 24, 1972, could not be the subject of a court action[1] (Pet. App. 20, 36).

In 1973, petitioner filed a second administrative claim, again alleging that she was denied a teaching position on the basis of her sex and national origin (Pet. App. 20). The complaint was rejected on the ground that it set forth matters identical to those raised in her original complaint. This time petitioner was notified of her right to sue within 30 days (Pet. App. 20-21).

Petitioner brought a timely action in the United States District Court for the Northern District of California. Her complaint, however, raised only the issues presented in the second administrative claim (Pet. App. 21-22). Eighteen months later, after respondents had filed a motion to dismiss and an alternative motion for summary judgment, petitioner moved to amend her complaint to add a cause of action based on the first administrative claim (Pet. App. 22). The district court denied the motion to amend and granted summary judgment for respondents.

On appeal, the court of appeals affirmed the denial of the motion to amend but reversed the award of summary judgment and remanded the case to the district court for further proceedings. The court of appeals held that federal employees could bring suit under Title VII for discrimination occurring before March 24, 1972 (Pet. App. 23-24), and it held that the notice of final administrative action with respect to petitioner's first claim did not start the

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[1]March 24, 1972, was the effective date of Section 717 of the Civil Rights Act of 1964, as added, 86 Stat. 111, 42 U.S.C. (Supp. V) 2000e-16, which provides a right to sue for alleged discrimination by the federal government.

running of the statutory 30-day period within which to file suit, because she had not explicitly been advised at that time of her right to sue (Pet. App. 25-30). The court found, however, that the 30-day period for her 1971 claim began to run when she was notified of her right to sue after the conclusion of the second administrative proceeding (Pet. App. 30-32). Since the motion to amend her complaint was not made until 19 months after petitioner was notified of her right to sue, the court of appeals held that the district court properly denied the motion to amend and declined to adjudicate the matters raised in her 1971 claim (Pet. App. 32).

2. The statutory provision governing civil actions in federal employee discrimination cases requires that suit be filed "[w]ithin thirty days of receipt of notice of final action." 42 U.S.C. (Supp. V) 2000e-16(c). Petitioner correctly notes that the courts of appeals disagree on the issue of whether the statutory "notice of final action" must contain notice of a right to sue.[2] That issue, however, is not presented in this case, since the court of appeals agreed with petitioner that notice of a right to sue is required. Instead, the court of appeals ruled against petitioner on the different—and unexceptionable—ground that the notice of a right to sue on her first claim was effectively provided when petitioner was notified of her right to sue on her second claim, and that the 30-day period began to run at that time on both claims. This holding is entirely consistent with *Coles* v. *Penny*, 531 F. 2d 609, 614 (C.A.D.C.), the nearest applicable precedent, and petitioner cites no authority to the contrary.

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[2]Compare *Eastland* v. *Tennessee Valley Authority*, 553 F. 2d 364 (C.A. 5), with *Coles* v. *Penny*, 531 F. 2d 609 (C.A.D.C.), and *Allen* v. *United States*, 542 F. 2d 176 (C.A. 3).

Making the same contention under a different banner, petitioner next argues (Pet. 11-14) that she should have been permitted to amend her complaint under the doctrine of equitable estoppel. Yet for the same reasons that the court of appeals held that the notice of her right to sue on her second claim was sufficient to start the time running on her first claim (Pet. App. 30-32), petitioner cannot rely on the allegedly erroneous interpretation of law by the Civil Service Commission at the time her first claim was denied to toll indefinitely the limitations period applicable to that claim. When she filed her complaint on the second claim within 30 days of the final administrative action on that claim, she had received a "right to sue" letter and had obtained counsel. Yet she waited another 18 months before seeking to raise the issues decided against her in the first administrative proceeding more than two years before.[3] The motion to amend was properly denied.

In any event, the present petition is premature. The court of appeals did not enter a final order in this case but remanded the case for further proceedings on petitioner's claim of discrimination. The result of those proceedings could, of course, render it unnecessary for this Court to

[3]*Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, on which petitioner relies, is inapposite. In that case the Court held that the Federal Employers' Liability Act statute of limitations would not be applied where the defendant had represented to the plaintiff that the applicable limitations period was seven years, rather than three, and the plaintiff was induced to delay suing until after the three-year statutory period had run. Here, by contrast, petitioner seeks to toll the statutory period for suit on the basis of the Commission's legal opinion on a question as to which she was in possession of all the relevant facts. See *Sturm* v. *Boker*, 150 U.S. 312. If the doctrine of equitable estoppel were applied in a case such as this one, the government would effectively waive forever the protection of a statute of limitations merely by stating its view that particular governmental conduct was not actionable.

resolve any of the questions presented here. Or, if the dispute is still unresolved at the conclusion of the proceedings on remand, all claims arising out of the case can be presented to the Court at the same time. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258; *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 378, 384.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.